IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 823 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ZUBEDABAI AMAD

Versus

SUNNI VOHRA IBRAHIM HAJI ABDULKARIM

Appearance:

MR SURESH M SHAH with Mr. MEHUL SHAH for Petitioners

MR AR THAKKAR FOR MR JR NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 11/02/2000

ORAL JUDGEMENT

This revision has been filed by the petitioners who are the original defendants of Regular Civil Suit No.9/74 by invoking jurisdiction of this Court under

Sec.29(2) of the Bombay Rent Act. The petitioners are the original defendants against whom, the respondent had filed a suit being Regular Civil Suit NO.9/74 in the Court of Civil Judge (J.D.) Jetpur, for getting the decree for possession of the suit premises.

2. The case of the plaintiff in the suit was that the suit premises was let out to the defet. No.1 at the monthly rate of Rs.5 and rent note to that effect was executed. It is alleged by the plaintiff that the deft. No.1 was in arrears of rent from 30th September, 1969 and inspite of notice of demand, she did not pay the arrears of rent from 1/10/1969. It is also the case of the plaintiff that the deft. NO.1 has illegally sublet the premises to the deft. Nos.2 and 3 and deft. No.1 has left Dhoraji and had also given an assurance that she would hand over the possession of the rented premises as soon as deft. Nos. 2 and 3 get another alternative accommodation. It is also the case of the plaintiff that the deft. No.1 has not used the premises for more than six months, immediately preceding the date of the suit and that she has acquired alternative accommodation. Ultimately after the registered notice which was sent by the plaintiff to the deft. NO.1, and the deft. NO.1 having failed to comply with the same, the aforesaid suit was filed for getting the decree for possession of the suit premises on the aforesaid grounds.

3. The suit of the landlord was resisted by the defendants by filing joint written statement at Ex.13. The defendants denied the claim of the plaintiff for possession. It was stated by the defendants in their written statement that all the defendants are the tenants of the plaintiff and that there was no question of any subletting by deft. NO.1 to deft. Nos. 2 and 3. The title of the plaintiff was also denied by the defendants. It was also stated that the premises is used and there is no substance in the ground of non-user. It was the specific case of the deft. Nos. 2 and 3 from beginning that deft. nos. 1 and 2 are the sisters and deft. No.1 had left the suit premises for a short time on the medical ground and that she has subsequently returned back in the suit premises, on the aforesaid grounds the suit was resisted by the defendants.

4. The learned trial judge framed various issues at Ex.15 and after recording the evidence and hearing both the sides, came to the conclusion that the deft. No.1 has illegally sublet the suit premises to the deft. Nos.2 and 3. It is found by the learned trial court that the deft. NO.1 has not used the suit premises without

reasonable cause for a continuous period of six months preceding the date of the suit. It was also found by the trial court that the deft. No.1 has acquired suitable alternatives accommodation. The trial court negatived the contention of the deft. Nos.2 and 3 that they are lawful tenants in the suit premises. Ultimately, on the aforesaid findings, the trial court by its judgement and order dtd. 29th April, 1978, decreed the suit for possession. The original defendants, being aggrieved by the aforesaid decree of the trial court, carried the matter further in appeal being Regular Civil Appeal NO.44/78. The aforesaid appeal was heard by the Extra Assistant Judge, Gondal, Dist. Rajkot. The appellate Judge also found that there was a clear cut case of subletting by the deft. NO.1 in favour of the deft. Nos. 2 and 3 and therefore, ultimately, on the aforesaid grounds the Appellate Judge confirmed the decree passed by the trial court by dismissing the appeal.

5. The petitioners, therefore, has filed the present Civil Revision Application challenging the decree passed by the trial court and confirmed by the appellate court in appeal. Mr.Mehul Shah learned advocate for the petitioners submitted that there is no evidence on record to show that there was any subletting of the premises by the deft. No.1 in favour of the deft. Nos. 2 and 3 and therefore, the findings of the courts below about the subletting is not sustainable. At the time of hearing of this civil revision application, Mr. Shah, learned advocate for the petitioners raised following points. (1) That looking to the conduct of the landlord, he has accepted the deft. Nos. 2 and 3 as his direct tenants, as even though notice was given in 1969, the suit was filed in 1974 and hence it can be presumed that the land lord has waived his right to evict the defendants from the suit premises, because of the aforesaid delay. (2) That the deft. Nos.2 and 3 are the direct tenants of the plaintiff as they have jointly taken the suit premises on rent. (3) in any case the Rent Act was not applicable in Saurashtra region of the State before 1963 and the suit premises was subjected to subletting in 1962 and therefore, the present suit under the Bombay Rent Act is not maintainable. (4) Alternatively the deft. Nos. 2 and 3 are the protected sub-tenants as per the Ordinance dtd. 21st May, 1959.

That in any case there is no parting of the possession by deft. No.1 in favour of the deft. Nos. 2 and 3 and therefore also, the provisions of sub-section 13(1)(e) of the Rent Act is not applicable and no decree for possession on the ground of subletting can be passed.

6. Mr. A.R. Thakkar, learned for the respondent in his turn has pointed out that there is a concurrent findings of both the courts below, and therefore, this court while sitting in the Revision Application cannot reappreciate the evidence. He has also pointed out that even otherwise, there is overwhelming evidence on record for coming to the conclusion that the deft. NO.1 has parted with the possession forever in favour of the deft. nos. 2 and 3 and it is, therefore, clear-cut case of subletting and on that ground the decree for possession is required to be confirmed by dismissing the revision application.

7. I have heard the arguments of both the sides at length and I have gone through the record and proceedings of the Courts below. So far as the say of the defendants that all the defendants are the joint tenants of the suit premises is concerned, there are certain aspects of the case which are not in dispute, and are required to be taken note off. That the deft. No.1. is the sister of the deft. No.2 and the deft. No.3 is the son of deft. NO.2. The rent note was executed in favour of the deft. NO.1 Jubeda. It is also not in dispute that the husband of the deft. NO.1-Jubeda was carrying his business at Umarkhed (Maharashtra). It has also come in evidence that the deft.NO.1 has left Dhoraji i.e. the place where the rented premises is situated, and she, along with her children went to Maharashtra where her husband was serving. If the evidence on record is examined closely, it is clear that in the year 1957-588, in the Voters List of the Jetpur Municipality at Serial Number 172, the name of the deft.No.1-Jubeda is shown as occupant of the suit premises, that shows that the deft. Nos. 2 and 3 were not in possession of the suit premises in the year 1957-58. Subsequently the deft. No.1 left Dhoraji and was residing with her husband in State of Maharashtra and that proves that she left the suit premises and handed over the suit premises to the deft. Nos. 2 and 3 exclusively. Even the Municipal Assessment abstract Ex.48 also shows that the deft. Nos. 2 and 3 were occupying the suit premises at the rate of Rs.25/- p.m. which is of subsequent period. Similarly Ex.49 is an abstract of Assembly Electoral Roll of 1971, which also clearly shows that the deft. Nos. 2 and 3 were occupying the suit premises in place of the original deft. i.e. deft. No.1 who did not figure in the said Electoral Roll in 1971 that clearly shows that she has left the suit premises at that particular point of time and deft. Nos. 2 and 3 are exclusively occupying the suit premises. Similarly, the name of the deft. NO.1 is

also not shown even in the Electoral Roll of 1975 of Jetpur Municipality and the the name of deft. Nos. 2 and 3 was there. Even Ex.15 and 31 are also of similar nature. Even when the plaintiff gave notice to the father of the deft. Nos. 1 and 2, the father of the deft. Nos.1 and 2 wrote a letter which is at Ex.56 specificality requesting the plaintiff that the deft. Nos. 2 and 3 would vacate the suit premises moment they get another premises. It is also interesting to note that the summons of the court regarding the suit proceedings was also served upon the deft. No.1 at Umarkheda in Maharashtra State. If really the deft. Nos. 2 and 3 were introduced as a tenant along with the deft. Nos. 1, by the landlord in the year 1957-58, naturally there would be some evidence on the record to show their presence in the suit premises during that period. I have specifically asked Mr. Shah to point out any document to show that at any point of time during that period the deft. Nos. 2 and 3 were residing in th suit premises when the original rent note was executed, but he has fairly pointed out that there is no evidence to that effect. The aforesaid question was also put in order to find out whether the petitioners can get the benefit of Ordinance dtd. 21st May, 1959. The said ordinance protects the sub-tenants who were occupying the suit premises as a sub-tenants prior to that date. Even if, the defendants, can point out that there were occupying the suit premises prior to 21th May, 1959, then also they can be protected by giving protection of the said Ordinance. However, Mr. Shah has fairly stated that there is no such evidence by which it can be said that the deft.Nos. 2 and 3 were in occupation at any point of time prior to 21st May, 1959. On the contrary as stated earlier the presence of the deft. Nos. 2 and 3 can be said to have been established at much letter point of time in view of the electoral roll and other documentary evidence produced on the record, I therefore find no substance in the aforesaid arguments of Mr. Shah to the effect that the deft. Nos. 2 and 3 were the direct tenants of the plaintiff from the inception of the tenancy. Therefore, there is no substance in the the arguments that the deft. Nos. 2 and 3 are the direct tenants of the plaintiff from the time of the inception of the tenancy. It was then argued that though the suit notice was given in 1969, the suit was filed in 1974 and therefore, the landlord has accepted the sub-tenancy. There is also no subsistence in the said arguments. It is the say of the plaintiff that the father of the deft. No.1 wrote a letter to the plaintiff at Ex.56 to the effect that the deft. Nos. 2 and 3 will vacate the suit premises moment they get their own premises, and

therefore, the plaintiff relied upon the same but having realised that the deft. Nos. 2 and 3 have no intention to vacate the suit premises, ultimately filed the aforesaid suit. It was argued by the respondent that therefore, there was no question of waiver. Mr.A.R. Thakkar for the respondent relied upon the decision of the Supreme Court reported in 1974 S.C. page 2089. The Hon'ble Supreme Court in para 13 of the judgement has held as under :

"Abandonment of right is much more than mere waiver, acquiescence or laches. The decision of the High Court in the present case is that the appellant has waived the right to evict the respondent. Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver some-times partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances shows what was done was involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehenson as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that

there was no consent."

8. It was further argued that the plaintiff has not waived his right and that it cannot be said that the plaintiff has no right to file a suit after a period of 5 years. It was also argued that even though the notice was given in 1969, and that the suit was filed in 1974, still the landlord was entitled to file the suit and such delay cannot defeat his right for approaching the court for getting the decree for possession on the ground of illegal subletting. Mr. Thakkar has relied upon the judgement of the Hon'ble Supreme Court, reported in 1996 S.C. 2361. In para 24 of the said judgement, it has been stated by the Hon'ble Supreme Court that;

"The Rent Act is a special statute governing and regulating tenancy and sub-tenancy. Such provisions in the special statute supersede the general law of tenancy if the provisions of the special statute are incompatible with the general law of tenancy. Under Sec.14 of the Rent Act, mere knowledge of the landlord about occupation of the tenanted premises by the said registered society and acceptance of rent for the tenanted premised tendered by the tenant in the name of the registered society, will not create a sub-tenancy unless induction of a subtenant is made with the written consent of the landlord. It is nobody's case that the landlord has given any written consent for induction of sub-tenant. There is no estoppel against statute. Hence, even if the landlord has accepted payment of rent for the disputed premises from the said property, such acceptance of rent will not constitute legal and valid sub-tenancy in favour of the registered society. Consequently, landlord will not be estopped from claiming eviction of unauthorised sub-tenant along with the tenant for indulging in inducing sub-tenant without lawful authority."

9. It was further argued by the respondents that the defendant had promised to vacate the suit premises after a reasonable period, but since they failed to abide by the said promise, the plaintiff, ultimately filed the aforesaid suit, and therefore, if the plaintiff had waited for few years it cannot be presumed that he has waived his right.

10. I find great substance in the aforesaid arguments

of Mr. Thakkar. Even otherwise, the aforesaid findings about the waiver would essentially be a finding of fact. Learned Appellate Judge has given very cogent reasons in coming to the conclusion that there is no waiver. This Court cannot, therefore, reappreciate the evidence produced on record. Even otherwise, the evidence produced on record is also sufficient to come to the conclusion that there is no waiver on the part of the plaintiff, and the act of subletting is an illegal act and it is open for the petitioner to challenge the same at any point of time by approaching the Court. I, therefore, do not find any substance in the arguments of Mr. Shah, learned advocate for the petitioners that the plaintiff has waived his right or is estopped from filing the suit for possession. Similarly, there is no substance in the arguments that since the landlord has accepted the rent from the deft. Nos. 2 and 3, he has accepted the deft. Nos. 2 and 3 as his direct tenant. Rent has been paid by the deft. Nos. 2 and 3 on behalf of the original defendant i.e. deft. No.1. I, therefore, see no substance merit in the said arguments.

11. So far as the contention of Mr. Shah about the applicability of Rent Act is concerned, the said argument is required to be rejected straightway. No such point was advanced in the written statement or stated in the evidence by the defendants, no such point is argued before the Trial Court or before the Appellate Court. The provisions of the Bombay Rent Act was initially not applicable in Saurashtra region of the State of Gujarat i.e. upto January, 1964. However, even in the Saurashtra Rent Act, similar provisions of subletting was there. Reference is required to be made to the judgement of this Court reported in 12 G.L.R. page 201, in which it is held that ;

> "Under Sec.12 of the Saurashtra Act protection to tenant taken away if premises sub-let and landlord entitled to eviction under Sec.13(1). Gujarat Act applied from January, 1964. Rights and liabilities before January, 1964 to be covered by the Saurashtra Act. Subletting before January, 1964 creates right in favour of landlord to terminate tenancy even though no notice served. Landlord can file suit even after January, 1964 on the ground of subletting".

In that view of the matter, there is no substance in the aforesaid argument.

12. It was next contended by the petitioner that

there was no parting of possession by the deft. No.1 and she was regularly visiting the suit premises by going to Dhoraji. To substantiate the aforesaid say, Mr. Shah has relied upon the judgement of the learned Single Judge of this Court (Coram : S.D. Dave,J.) reported in 1996 (1) All India Rent Control General, 594. In the aforesaid case, the learned Single Judge of this Court has taken a view that there should be a parting of possession by the tenant and there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of right to possession. Relying upon the said observations, it was contended by Mr. Shah that the deft. No.1 has not given up her right of possession qua the suit property. It was argued that assuming that the deft. NO.1 has physically parted with the possession, it cannot be said that she has lost here right qua the suit premises. However, the aforesaid judgement of the Hon'ble Single Judge of this Court (Coram : S.D. Dave, J.) has already been over-ruled by the Hon'ble Supreme Court in Civil Appeal No.7956/96 and Hon'ble Supreme Court in that case, while reversing the judgement of the learned Single Judge (Coram : S.D. Dave, J.) has restored the decree for possession passed by the trial court. The aforesaid judgement of the learned Single Judge, therefore, do not hold the field. Before citing any authority, the Counsel is required to take care and to verify whether the judgement which is cited at the bar is over-ruled or not. In view of the aforesaid position, the aforesaid contention of Mr. Shah is not required to be examined any further There is overwhelming evidence on record, to show that the original tenant i.e. deft. No.1 is staying with her children and husband in Maharashtra In the facts and circumstances of the case, there is total parting of the possession by the tenant i.e. deft. No.1 in favour of the deft. Nos. 2 and 3. Her casual visit at Dhoraji in the suit premises cannot take her case any further. It is interesting to note that the original tenant i.e.deft. NO.1 has not even entered into the witness box to substantiate her say. In view of that, there is no substance in the aforesaid argument of Mr. Shah. Sec. 13(1)(e) of the Act clearly provides that if the tenant has transferred his interest in the suit property or has parted with the possession in any manner, the provisions of the said Section is attracted. There is overwhelming evidence on record to show that the deft. No.1 has parted with the possession of the suit property in favour of the deft. Nos. 2 and 3.

13. It was, thereafter argued that in view of the 1982 S.C. 1091, the deft. Nos.2 and 3 can be said to be

the family members of the deft. No.1. In the said judgement the tenant had gone to foreign country allowing his mother, sister and brother to continue to occupy the suit premises. In that connection, the Hon'ble Supreme Court came to the conclusion that it cannot be said that the other family members seized tobe a family members of the tenant. In the instant case, the deft. Nos. 2 and 3 have failed to establish that they were occupying the suit premises from beginning with the original tenant i.e. deft. No.1. The evidence on record on the contrary suggests otherwise. Therefore, looking to the facts of the case on hand, the aforesaid judgement of the Hon'ble Supreme Court is not applicable.

14. It was then argued that the sub-tenancy is a question of law, and therefore, this Court can entertain this revision application on the ground that there was an error of law committed by the Appellate Court. Whether the evidence on record constitute subletting or not, is definitely a question of law. However, in the instant case, no other conclusion is possible on correct interpretation of documentary evidence as well as oral evidence, the learned Appellate Judge has come to the conclusion that the landlord has established the case of subletting against the deft. NO.1.

15. It was next argued by Mr. Shah that in view of 1999 S.C. 3331, if a premises, right from the inception of tenancy was occupied by the employee of the firm and who was relative of one the partners and if the said employee has subsequently become a proprietor of the firm, it was found by the Hon'ble Supreme Court that there was no transfer or assignment of tenancy by the firm.

16. As stated earlier, deft. Nos. 2 and 3 could not prove that from the inception of tenancy, they were occupying the suit premises. In-fact after the deft. No.1 left the suit premises. They were inducted in the suit premises. The aforesaid ruling of the Hon'ble Supreme Court is not applicable in the facts of the present case.

17. These were the only submissions of Mr. Shah and I see no merit in the same and the same are rejected. The Civil Revision Application deserves to be dismissed and the same is accordingly dismissed. Rule is discharged. No order as to costs.

18. At this stage, Mr.Shah requested that deft. Nos. 2 and 3 may be given some reasonable time to vacate the

suit premises. Mr. Thakkar has pointed out that deft. No.2 is residing elsewhere and respondent No.3 though occupying the suit premises, has been allotted other premises by the community people. However, looking to the facts and circumstances of the case, time for vacating the suit premises is granted upto 31/3/20001. The aforesaid time is granted on condition that the petitioners shall file usual undertaking before this Court within a period of 8 (eight) weeks from today. In the aforesaid undertaking it should specifically provided that the petitioner Nos. 2 and 3 are in exclusive possession of the suit premises, they have no right, title or interest in the suit premises and without obstructing in any manner, all the petitioners will hand over the vacant and peaceful possession of the suit premises to the land lord or or before the aforesaid date. The petitioners should also pay mesne profits regularly every month. If the aforesaid undertaking is not filed within the stipulated period or if there is any breach of the aforesaid undertaking, it will be open for the respondent to execute the decree for possession forthwith.

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